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No. 99-187

In The

Supreme Court of the United States

LAURANCE LAWENSCHUSS, Trustee of the Fred Lowenschuss Associates Attorneys at Law Pension Plan,

Petitioner,

v.

BEVERLY SELNICK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Petition for Certiorari should be granted?

(2) Whether the Ninth Circuit Court of Appeals' affirmation of the lower court's factual determination that the Fred Lowenschuss Attorney At Law Pension and Profit Sharing Plan ("Pension Plan") was not qualified pursuant to the Employee Retirement Income Security Act ("ERISA") was incorrect as a matter of law?

(3) Whether the Ninth Circuit Court of Appeals' affirmation of the lower court's factual determination that Fred Lowenschuss ("Debtor"), the sole owner of the sponsor of the Pension Plan, was not an "employee" pursuant to 29 C.F.R. § 2510.3-3 was incorrect as a matter of law?

(4) Whether the Ninth Circuit Court of Appeals erred as a matter of law in determining that 11 U.S.C. § 541(c)(2) requires an enforceable non-bankruptcy law trust anti-alienation restriction in order to exclude a debtor's beneficial interest in a non-ERISA qualified pension plan from a debtor's bankruptcy estate?

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The opinion of the court of appeals is reported as *In re Lowenschuss*, 171 F.3d 673 (9th Cir. 1999). Petitioner's Appendix ("Pet.App.") 1a-24a. The opinion of the district court is unreported. Pet.App. 26a-38a. The opinion of the bankruptcy court is reported as 202 B.R. 305 (Bankr.D.Nev. 1996). Pet.App. 39a-69a.

JURISDICTION

Respondent Beverly Selnick ("Selnick") does not contest the Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 541 which provides in pertinent part:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> . . .
>
> (c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

29 C.F.R. § 2510.3-3(b) which provides in pertinent part:

> Plans without employees. For purposes of Title 1 of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program . . . under which no employees are participants covered under the plan . . .

29 C.F.R. § 2510.3-3(c) which provides:

> Employees. For the purposes of this section:
>
> (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse . . .

42 Pa. Cons. Law Ann. § 8124(b) which provides:

> b) Retirement funds and accounts. –
>
> 1. Except as provided in paragraph (2), the following money or other property of the judgment debtor shall be exempt from attachment or execution on a judgment:
>
> . . .
>
> (ix) Any retirement or annuity fund provided for under section 401(a), 403(a) and (b), 408 or 409 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 401(a), 403(a) and (b), 408 or 409), the appreciation thereon, the income therefrom and the benefits or annuity payable thereunder and transfers and rollovers between such funds. This subparagraph shall not apply to:

(A) Amounts contributed by the debtor to the retirement or annuity fund within one year before the debtor filed for bankruptcy. This shall not include amounts directly rolled over from other funds which are exempt from attachment under this subparagraph.

(B) Amounts contributed by the debtor to the retirement or annuity fund in excess of $15,000 within a one-year period. This shall not include amounts directly rolled over from other funds which are exempt from attachment under this subparagraph.

STATEMENT OF THE CASE

OVERVIEW

In July 1991, after nearly ten years of litigation, Fred Lowenschuss ("Debtor") and his wife of twenty-five years, Beverly Selnick, were divorced in the Commonwealth of Pennsylvania. Eighty percent of nearly $11 million in marital assets subject to equitable distribution in the divorce proceedings consisted of the Fred Lowenschuss Associates Attorneys at Law Pension and Profit Sharing Plan (the "Pension Plan") assets. Debtor was the sole owner of the Pension Plan sponsor, the Pension Plan's sole or co-trustee at all times prior to July 1991 and was shown on all the Income Tax Returns filed prior to 1992 as the sole beneficiary of the Pension Plan.

Selnick's domestic award equaled $5.288 million; over $3 million of which consisted of Pension Plan assets. Debtor was ordered to disburse Selnick's property to her within ninety days of the divorce decree; not a particularly difficult process, as the Pension Plan assets were primarily publicly traded stocks and bonds in Debtor's possession. As of the date of this pleading, only a mere fraction of Selnick's award has been paid, as Debtor fled Pennsylvania and absconded with the Pension Plan assets after the Divorce Decree was entered.

In August of 1992, barely two months after the Court's pronouncement of *Patterson v. Shumate*, Debtor filed a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Nevada. On Debtor's bankruptcy schedules, he listed his primary asset as the Pension Plan, which was claimed exempt pursuant to *Patterson v. Shumate*. Pet.App. 3a. He also listed Selnick as having a disputed unsecured claim in an approximate amount of $5,000,000.00. Pet.App. 47a. Immediately post-petition, Debtor took actions to make the Pension Plan appear to be an ERISA-qualified plan. Past beneficiaries were manufactured; previous years' Income Tax returns were amended. Thus, by classifying Selnick as an unsecured creditor and exempting the Pension Plan from his bankruptcy estate pursuant to *Patterson v. Shumate*, Debtor could forever deny Selnick the marital property awarded to her.

The Petition for Certiorari was filed by the Pension Plan Trustee, Debtor's son. The Petition is but another attempt to forestall and/or delay paying Selnick her property. The Ninth Circuit Court of Appeals was correct in affirming the lower court. The Petition presents no

new or novel issues, as the Court has issued opinions in this area in 1992 (*Patterson v. Shumate*) and in 1998 (*Boggs v. Boggs*). The case is factually based, presenting a unique set of circumstances with no crystallized issue of broad significant impact. In short, the Petition is factually and legally deficient in warranting review; it should be denied.

A. The Divorce Proceedings

On July 10, 1991, after ten years of litigation,[1] The Court of Common Pleas of Montgomery County, Pennsylvania (the "Pennsylvania Court"), entered an Order and Findings of Fact, Conclusions of Law and Opinion (together, the Divorce Order and Findings of Fact are referred to as the "Divorce Decree") divorcing Debtor and Selnick. In the Divorce Decree, the court equitably distributed the marital estate pursuant to 23 P.S. 401 (now 23 Pa.C.S.A. § 3502(a)) which provided that upon request of either party the Court shall equitably divide, distribute or assign in kind or otherwise, the marital property between the parties without regard to marital conduct after considering all relevant factors. Pet.App. 3a; 41a-43a.

The Divorce Decree identified over $8 million of the Pension Plan assets as marital assets and awarded Selnick 38.7% of the Pension Plan assets from inception to August, 1981 plus interest at 10% compounded annually since August, 1981, for a total July, 1991 value of

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[1] Certain aspects of the divorce proceedings are reported in *Lowenschuss v. Lowenschuss*, 579 A.2d 377 (Pa. 1990).

$3,173,490.00.[2] The Pennsylvania Court directed that Selnick pay any penalty imposed under the Internal Revenue Code and that Debtor pay any income tax imposed under the Code as a result of Selnick being distributed her portion of the marital estate. Debtor, as the administrator and trustee of the Pension Plan, was ordered to make the equitable distribution payments within three (3) months of the date of the Divorce Order. After the three month period passed, interest was due at a rate of 6% per year on the unpaid distribution. Pet.App. 41a-43a.[3]

In derogation of the Divorce Decree, Debtor did not distribute to Selnick her portion of the marital property within ninety days. Rather, Debtor fled Pennsylvania and absconded with the marital property. Pet.App. 3a; 44a-46a.

On February 10, 1992, the Pennsylvania Court held a contempt hearing against Debtor and issued a bench warrant for his arrest. Pet.App. 44a. On March 13, 1992, pursuant to 23 Pa.C.S.A. § 3502(e), and as an alternate

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[2] On August 20, 1985, the Pennsylvania Court assumed jurisdiction over the Pension Plan as a third party who was involved in or concerned with the disposition of the cause pursuant to 23 P.S. § 401(c).

[3] Contrary to the Pension Plan Trustee's claim that the Pennsylvania Court did not enter a qualified domestic relations order because the Pennsylvania Court did not intend to grant Selnick an ownership interest, "the issue of whether the Pension Plan was ERISA qualified never litigated during the divorce proceedings because Debtor testified during those proceedings that he was the sole participant in the Pension Plan, which would have prevented the Pension Plan from being ERISA qualified." *In re Lowenschuss*, 170 F.3d 923, 929 (9th Cir. 1999).

method of enforcement, Selnick received a judgment against Debtor and the Pension Plan in the amount of $5,345,090.00 plus interest at six percent (6%) per annum commencing October 10, 1991 (the "March 1992 Judgment").[4] Pet.App. 44a-45a; *see also In re Lowenschuss*, 170 F.3d at 931, n.8 (9th Cir. 1999) (finding that the Pennsylvania Court entered a $5.3 million judgment in favor of Selnick and against both Debtor and the Pension Plan and that "[i]t has long been established in these proceedings that Debtor and the Pension Plan are one in the same").[5]

Debtor, with assets in tow and in an attempt to avoid paying Selnick, began a cross-country odyssey which ultimately landed him in Nevada and before the bankruptcy court. Pet.App. 3a; 45a-47a.

B. The Bankruptcy Proceedings

On August 24, 1992 (the "Petition Date"), over a year after the Divorce Decree was entered, Debtor filed his

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[4] Pa.C.S.A. § 3502(e) in relevant part provides:

> Powers of the court-If, at any time, a party has failed to comply with an order of equitable distribution, as provided for in this chapter or with the terms of an agreement as entered between the parties, after hearing, the court may, in addition to any other remedy available under this part, in order to effect compliance with its order:
>
> (1) enter judgment . . .

[5] On the same day as the decision was entered in the case which the Pension Plan Trustee's now requests certiorari, the Ninth Circuit decided *In re Lowenschuss*, 170 F.3d 923 (9th Cir. 1999). No party to that sister opinion, including Debtor or the Pension Plan Trustee, has requested certiorari on that decision.

Chapter 11 petition in the United States Bankruptcy Court for the District of Nevada. Debtor's schedules listed the Pension Plan as exempt pursuant to *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992) and listed Selnick as an unsecured creditor. The filing of Debtor's bankruptcy petition conveniently followed the issuance of the *Patterson v. Shumate* by approximately two months. Pet.App. 3a; 46a-47a. Amended Pension Plan tax returns for past tax years were filed after the *Shumate* case was issued, obviously contrived to make the Pension Plan appear to fall within the holding of that case. Pet.App. 28a-29a; 61a. These amended tax returns purported to amend the number of Pension Plan participants from the originally reported one participant, that being Debtor, to three participants. The two alleged additional participants were Debtor's sons. Pet.App. 61a.[6]

On December 2, 1992, Selnick filed a proof of claim in Debtor's bankruptcy. Selnick also filed an Objection to Claim of Exemption and an Amended Objection to Claim of Exemption, objecting to Debtor's exemption of the Pension Plan from the bankruptcy estate on the grounds Debtor cited. Selnick argued that she had an ownership interest in the Pension Plan pursuant to the equitable distribution of the marital estate in the Divorce Decree. Pet.App. 48a.

After hearings on the issue, United States bankruptcy court [Judge Thompson, presiding] entered its Findings

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[6] Contrary to the Pension Plan Trustee's claim that the Pension Plan was a multi-participant plan, no court has found credible evidence that the Pension Plan had participants other than Debtor.

of Fact, Conclusions of Law and Judgment on July 21, 1993 (the "Exclusion Order"). The Exclusion Order denied Selnick's Amended Objections to Exemption and held that the Pension Plan was ERISA-qualified and, therefore, was not part of Debtor's bankruptcy estate. Selnick appealed the Exclusion Order. Pet.App. 3a; 48a.

The bankruptcy court continued with the confirmation of the Debtor's proposed plan of reorganization (the "Plan of Reorganization"). Despite argument by Selnick's counsel that Selnick had an ownership interest as a result of the Divorce Decree, at a hearing on the confirmation of the Plan held on October 27, 1993, Bankruptcy Judge Thompson ruled that as a result of the Divorce Decree and the March 1992 Judgment Selnick's status was merely that of an unsecured judgment creditor. Pet.App. 4a; 50a; *see also In re Lowenschuss*, 170 F.3d at 927.

While the Exclusion Order Appeal was pending, the bankruptcy court confirmed the Plan of Reorganization in an order entered October 28, 1993 (the "Confirmation Order"). In the Plan of Reorganization, Selnick was treated as an unsecured money judgment creditor (consistent with the bankruptcy court's oral ruling of October 27, 1993) and was to receive $10,000 per month from Pension Plan in satisfaction of her allowed claim. On November 5, 1993, Selnick appealed, among other issues, the Confirmation Order and the bankruptcy court's oral finding of October 27, 1993, that she did not have an ownership interest in the marital assets pursuant to the

equitable distribution. (the "Confirmation Order Appeal"). Pet.App. 4a; 27a; 48a.[7]

On August 19, 1994, district court Judge Edward C. Reed vacated and remanded the Exclusion Order (the "Remand Order") with instructions to the bankruptcy court to consider additional evidence regarding the Pension Plan's ERISA qualification. Pet.App. 4a; 27a; 49a.

Contrary to the Pension Plan Trustee's allegations, on August 19, 1994, the district court also entered a Minute Order which stated that "the bankruptcy plan *cannot be confirmed* without [exclusion/exemption] issue being resolved." (emphasis added). Pet.App. 4a; 27a; 51a.

The district court on several occasions addressed and rejected Debtor's arguments regarding the status of the Plan of Reorganization as "confirmed and substantially consummated." Specifically, Judge Reed confirmed his position regarding the Plan of Reorganization in his order entered August 27, 1996, stating "the court long ago ruled that the plan could not be confirmed, and stayed proceedings with respect to it in order to allow the exemption issue to be resolved." Pet.App. 51a-52a; 32a-33a. Additionally, on April 28, 1994, Judge Reed denied Debtor's Motion to Dismiss the Confirmation Appeal stating:

> [Selnick] is the only significant creditor in this matter and not even 3% of the payments due her

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[7] The district court vacated the Confirmation Order on July 1, 1997. The district court's ordering vacating the Confirmation Order was affirmed by the Ninth Circuit on March 17, 1999. *In re Lowenschuss*, 170 F.3d at 932-33; Pet.App. 8a, n.6.

> under the Plan [of Reorganization] have been made.
>
> . . .
>
> The Plan or [sic] reorganization has not been substantially consummated. Nor has any event occurred which would render it impossible for the bankruptcy court to fashion appropriate relief in the event the Order on the Pension's Exemption issue is reversed by the Court. To the contrary, in the event of reversal, Selnick and [Debtor's] others creditors will have enforceable claims against the assets of the Pension fund which will greatly exceed what they have been paid to date. In addition, [Debtor] knew at the time the reorganization plan was confirmed that Selnick had appealed the bankruptcy court's decision regarding the exemption issue and fully intended to appeal the confirmation. Under these circumstances, we conclude that this appeal is not moot.

Pet.App. 50a-51a.

On remand from the Exclusion Order Appeal, on November 1, 1996, bankruptcy court Judge Gregg W. Zive entered a Memorandum Decision and Order (the "November 1996 Order"); *In re Lowenschuss*, 202 B.R. 305 (Bankr.D.Nev. 1996) Pet.App. 39a-69a. Judge Zive ruled that the Pension Plan was not ERISA-qualified and that Debtor's beneficial interest in the Pension Plan was property of the estate. Pet.App. 63a.

Judge Zive also ruled that Nevada state exemption law would be applied to determine Debtor's allowable

exemptions under 11 U.S.C. § 522. Pet.App. 65a.[8] Based on Debtor's previous actions and the fact that Debtor's beneficial interest in the Pension Plan was now part of the bankruptcy estate, Judge Zive also appointed a Chapter 11 Trustee. Pet.App. 65a-67a. Debtor appealed the November 1996 Order.

On February 4, 1998, the district court affirmed the November 1996 Order. Pet.App. 38a.

C. The Ninth Circuit Appeal

Debtor appealed the February 4, 1998 Order to the Ninth Circuit Court of Appeals. On March 17, 1999, the Ninth Circuit affirmed the bankruptcy court and the district court. Pet.App. 24a.

1. The Pension Plan Is Not ERISA-Qualified Under The Facts Of This Case.

The Ninth Circuit held that because the Pension Plan's transfer restriction was unenforceable under ERISA on the Petition Date, Debtor's beneficial interest in

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[8] As noted by the Ninth Circuit:

> In a separate order . . . the bankruptcy court determined that up to $100,000 of Debtor's beneficial interest in the Pension Plan was exempt from the bankruptcy estate under Nevada law. However, the bankruptcy court noted that Debtor admitted to receiving over *$1,000,000* from the Pension Plan from the Petition Date through March 18, 1997, and that Debtor has therefore exhausted much more than the exemption could possibly permit.

Pet.App. 4a, n.2 (emphasis added).

the Pension Plan could not have been excluded under 11 U.S.C. § 541(c)(2) using ERISA as the applicable non-bankruptcy law. Pet.App. 11a. In reaching this holding, the Ninth Circuit, consistent with the district court, made a factual finding that on the Petition Date, and at least seven years prior to that date, Debtor was the sole owner of the sponsor of the Pension Plan and the sole beneficiary of the Pension Plan. Pet.App. 11a-12a. The Ninth Circuit cited C.F.R. 2510.3-3(b), (c)(1), for the rule that plans without "employee" participants are excluded from ERISA and that the sole owner of a company sponsoring the plan, such as Debtor, is excluded from the definition of an "employee". Pet.App. 11a. Finally, the Ninth Circuit found that the purposes of ERISA would not be thwarted by its decision. The Ninth Circuit stated that "ERISA was not designed as a means for Debtor, who happens to be simultaneously the 'trustee, administrator, sponsor, and sole beneficiary of the Pension Plan,' to exclude his interest in the Pension Plan from creditors of the bankruptcy estate." Pet.App. 13a.

Moreover, the Ninth Circuit specifically addressed the argument of the Pension Plan Trustee regarding the termination of an ERISA-qualified plan, stating that 29 U.S.C. § 1341 (which sets forth the means for terminating an ERISA qualified plan) does not apply to the Pension Plan, as it is not ERISA-qualified. Pet.App. 12a, n.8.

2. Debtor's Beneficial Interest In The Pension Plan Was Not Excluded Under Pennsylvania Law, Under The Facts Of This Case.

The Ninth Circuit held Debtor's beneficial interest in the Pension Plan was not excluded from the bankruptcy estate under Pennsylvania law. Pet.App. 15a-20a.[9] Specifically, the Ninth Circuit held that "in order for the Debtor's beneficial interest in the Pension Plan to be excluded under Pennsylvania law, two conditions must be satisfied: (1) the Pension Plan must contain a transfer restriction, and (2) that transfer restriction must be enforceable under Pennsylvania law." Pet.App. 16a. The Ninth Circuit then held that Debtor's interest in the Pension Plan could not be excluded under Section 8124(b) of the Pennsylvania Consolidated Statutes because that exemption does not allow Debtor to enforce the Pension Plan's transfer restriction as *Patterson v. Shumate* requires. Pet.App. 16a-17a. Specifically, the Ninth Circuit held that Section 8124(b) does not provide a mechanism by which Debtor could enforce the transfer restriction contained in the Pension Plan documents. Pet.App. 16a-17a.

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[9] The Ninth Circuit also held that: (1) Selnick's appeal was not moot based on certain restrictive endorsements placed on checks paid to her pursuant to the Plan because such negotiations were authorized by the bankruptcy court; (2) Selnick's appeal was not equitably moot; (3) dismissal of a turnover action instituted by the then-Chapter 7 Trustee was not res judicata as to Selnick; (4) the bankruptcy court had jurisdiction to consider the exclusion of the Pension Plan in the November 1996 Order; (5) Debtor was domiciled in Nevada for the purposes of 11 U.S.C. § 522(b); and (6) the bankruptcy court did not abuse its discretion in appointing a Chapter 11 Trustee.

In his Petition for a Writ of Certiorari, the Pension Plan Trustee requests review of the Ninth Circuit's decisions that: (1) the Pension Plan was not ERISA-qualified as of the Petition Date; and (2) pursuant to 11 U.S.C. § 541(c)(2), the Pension Plan is not excluded from the bankruptcy estate under Section 8124 of the Pennsylvania Consolidated Statutes.

REASONS FOR DENYING THE WRIT

This writ should be denied because: (1) resolution of the ERISA-qualification issue does not involve important questions of public issues or well-developed conflicts between federal courts of appeal; (2) resolution of the issues necessarily includes unique issues of fact in the eighteen-year old case; (3) the case is essentially a two-party domestic dispute which will only affect Debtor and Selnick; and (4) resolution of the exclusion of the Pension Plan assets pursuant to Pennsylvania state law is not outcome determinative.

I. THE PENSION PLAN IS NOT ERISA-QUALIFIED

A. This Case Is Factually Driven And Will Not Impact ERISA Law.

A Writ of Certiorari is reserved for important questions of national public issues or important and well-developed conflicts between federal courts of appeal. This is not such a case. Rather, this case focuses on the eighteen-year history of Debtor's improper attempts to

deprive Selnick of her rightful ownership interest in marital property, specifically the Pension Plan marital assets. As the bankruptcy court factually determined:

> [Debtor] has hidden assets, ignores or refuses to comply with orders and judgments from a variety of state and federal courts, and has patently attempted to manipulate the judicial system to avoid his long-established obligations.

Pet.App. 63a.

The factual and procedural record of this case is a web of entanglements of Debtor's making which simply does not merit this Court's formal review.

Contrary to the Petitioner's feigned benevolence, the question of ERISA qualification of the relevant Pension Plan is not a matter of important public policy for all small business pension plans. The decision upon which the Pension Plan Trustee requests certiorari, *In re Lowenschuss*, 171 F.3d 673 (9th Cir. 1999), turns on it own facts and any decision of this Court will affect no parties other than Debtor and Selnick.

The facts of this case reflect an eighteen-year domestic dispute in which Debtor, an attorney, fled from Pennsylvania with the Pension Plan assets in tow to avoid turning them over to Selnick, was held in contempt, drifted from state to state to avoid execution and then two months post-*Patterson* landed in Nevada to file bankruptcy. Pet.App. 3a. Once in bankruptcy, Debtor claimed for the first time that the Pension Plan was ERISA-qualified. When Debtor realized the need for other employees to legitimize his claims of ERISA-qualification, Debtor "quickly changed his story" and created employees by

supposedly contributing monies to the Pension Plan four months post-petition on behalf of his sons and then disingenuously claiming that his sons were employees and participants of the Pension Plan all along. Pet.App. 14a; 29a. Each court reviewing these facts, from the bankruptcy court to the Ninth Circuit, has seen through Debtor's transparent attempt to fabricate an ERISA qualification when none existed. Pet.App. 28a-29a; 60a-63a. The district court found Debtor's activities to be part of his "ongoing crusade to stymie his ex-wife's . . . attempts to collect the debt he owed her . . . so reminiscent of Charles Dickens' *Jarndyce v. Jarndyce*." Pet.App. 26a. The bankruptcy court summarized its position on the case as follows:

> Lowenschuss has little credibility. His belated attempts to change the Pension Plan from single to multi-participant are a sham. He controlled his sons. This court, as have other courts, finds that Lowenschuss and [his son] have changed their testimony in a fruitless attempt to have the Pension Plan be considered ERISA-qualified. All Lowenschuss and his son have proven is that they will take any convenient position to frustrate Selnick's search for Pension Plan assets to satisfy the Divorce Decree and Judgment, even if those positions are directly contrary to their earlier sworn testimony. They are not to be believed and the evidence they attempted to use to convince this court that the plan had multi-participants and that those participants were Lowenschuss' sons is not credible.
>
> The only conclusion a reasonable person could draw from the years of endless litigation and voluminous evidence adduced at the cost of

> almost two million dollars in attorney's fees is that Lowenschuss has and will do or say whatever it takes to avoid his obligation to Selnick under the Divorce Decree and Judgment.

Pet.App. 62a.

Selnick submits that a denial of the Petition in this case will not threaten the small businessmen of the United States, but hopefully will send a message that such evasion of a court-ordered domestic obligation and abuse of the bankruptcy process will not be tolerated. Moreover, a grant of review will only serve to encourage sole business owners to manipulate their pension plans and the judicial system to avoid distribution of what is typically the primary marital asset in domestic proceedings. To quote the Petitioner, "Can this be what Congress intended when enacting ERISA?" Petition 21. Surely not.

This is not the case in which a pension plan "falls out" of ERISA through attrition of its participants as Petitioner would have the Court believe. Rather, this is a case in which each of the lower courts have determined that no "employees" were participants in the Pension Plan. Pet.App. 13a. As the Ninth Circuit stated, Petitioner "mischaracterizes the issue presented for review as the termination of an ERISA plan . . . Although 29 U.S.C. § 1341 is the exclusive means by which an ERISA plan may be terminated, that statute does not apply to non-ERISA plans such as Debtor's." Pet.App. 12a, n.8. A review of 29 U.S.C. § 1341(b) provides that standard termination under ERISA requires notices from the administrator to the corporate sponsor, the beneficiaries and the participants. In this case, as of the date the bankruptcy petition was filed, Debtor wore all of the

relevant hats of the Pension Plan: He was the administrator, trustee, sole owner of the corporate sponsor, and sole beneficiary. He should not be allowed to hide behind the protective termination notice requirements of an ERISA-qualified plan.

ERISA was "designed to ensure the proper administration of the pension and welfare plans," and "to protect plan participants and beneficiaries." *See* 29 U.S.C. § 1001; *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). Congress enacted ERISA protections "to remedy abuses by employers who manage pension plan assets held in trust for workers in traditional employer-employee relationships." *Massachusetts Mut. Inc. Co. v. Russell*, 473 U.S. 134, 142 (1985). A self-employed owner who is also the trustee and the administrator of the pension plan, such as Debtor, is not vulnerable to such employer abuses. "Self interest provides adequate protection." *In re Watson*, 161 F.3d 593, 598 (9th Cir. 1999). "Debtor did not need the protections of ERISA to protect himself from the Pension Plan's administrator because Debtor was the administrator." Pet.App. 13a.

B. The Ninth Circuit Correctly Excluded Debtor As An "Employee."

The Pension Plan Trustee claims the Ninth Circuit erred in determining that ERISA does not cover a pension plan if the only beneficiary is the sole owner of the company funding the plan. Pet.App. 11a-14a. The Pension Plan Trustee erroneously states that "even if the Pension Plan had no participants other than the Debtor, under the plain language of ERISA, the Pension Plan would still be

subject to ERISA." Petition 12. The Pension Plan Trustee cites 29 U.S.C. § 1002(6) for the definition of "employee" as "any individual employed by an employer."[10]

While it is clear that pursuant to 29 U.S.C. § 1002(6), an ERISA employee benefit plan must have "employee" participants, that "statute does not adequately define the term 'employee.' " *In re Watson*, 161 F.3d 593, 596 (9th Cir. 1998). The definition of the term "employee" in 29 U.S.C. § 1002(6) is "completely circular and explains nothing". *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992).[11]

Congress authorized the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this [ERISA]

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[10] Contradicting himself, the Pension Plan Trustee then states, "the Pension Plan Trustee does not contest that ERISA cannot extend to a pension plan that never had non-owner participants. In fact, the cases are clear that one cannot establish an ERISA benefits plan unless one or more non-owner employee participates." Petition 19.

[11] In *Darden*, the Court used the "common law" definition of an employee. However, that case is inapposite as the issue before the Court in *Darden* was not the dual status of employer-employee, but the distinction between "employees" and "independent contractors". The use of traditional common law agency criteria "can be applied logically only in situations involving relationships between two different persons, i.e., those who employ persons and those who are so employed . . . The issue here is different. It is whether a self-employed owner is also his own 'employee' for purposes of qualifying his Plan under ERISA. Thus, we cannot logically apply Darden in this case." *In re Watson*, 161 F.3d at 597.

subchapter." 29 U.S.C. § 1135. Pursuant to that delegation, the Secretary promulgated certain regulations, including 29 C.F.R. § 2510.3-3(b) which provides that:

> For purposes of Title 1 of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program . . . under which no employees are participants covered under the plan . . .

29 C.F.R. 2510.3-3(b). The regulations also provide that:

> [a]n individual and his spouse shall not be deemed to be employees with respect to a trade business, whether incorporated or unincorporated, which is wholly owned by the individual and his or her spouse.

29 C.F.R. § 2510.3(c)(1).

A plain reading of this regulation together with the purposes behind the enactment of ERISA, i.e. to protect vulnerable "employees" from abuses by employers who maintain exclusive control over the employees' pension funds, clearly demonstrates that a sole owner who is also the sole beneficiary, trustee and administrator of a pension plan, such as Debtor, does not require the protections afforded by ERISA. Numerous other courts have held that a sole owner of a corporation is not considered an "employee" for the purposes of ERISA. *See Matinchek v. John Alden Life Ins. Co.*, 93 F.3d 96 (3d Cir. 1996) (holding that plan covering only sole business owner and his or her immediate family members cannot qualify as employee welfare benefit plan under ERISA); *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995) (same); *Meredith v. Time Ins. Co.*, 980 F.2d 352 (9th Cir. 1993) (same); *Fugarino v. Hartford Life & Accident Ins. Co.*,

969 F.2d 178 (6th Cir. 1992) (same); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (holding that sole shareholder employed by company he owned was "employer" for the purposes of ERISA); *Schwartz v. Gordon*, 761 F.2d 864 (2d Cir. 1985) (holding that plan whose sole beneficiaries are company's owners cannot qualify as plan under ERISA); *Peckham v. Board of Trustees*, 653 F.2d 424 (10th Cir. 1981) (holding that sole proprietors cannot have dual status under ERISA as employer and employee); *In re Watson*, 161 F.3d 593 (9th Cir. 1999) (holding that sole owner of medical corporation is not an "employee" for purposes of ERISA).

C. The Ninth Circuit Is Not In Conflict With The Fourth Circuit.

Petitioner erroneously claims that the Ninth Circuit's ruling regarding whether the Pension Plan was ERISA-qualified as of the Petition Date is in conflict with the Fourth Circuit's decision in *Madonia v. Blue Cross and Blue Shield of Va.*, 11 F.3d 444 (4th Cir. 1993), *cert. denied*, 511 U.S. 1019, 114 S.Ct. 1401, 128 L.Ed.2d 74 (1994). On the contrary, in *Madonia*, the Fourth Circuit held that "Department of Labor regulations . . . provide that the plan must involve at least one employee other than the corporation's sole owner to satisfy the "participant requirement" and that the sole owner of a corporation could not "be considered a 'participant' for the purposes of determining the existence of an employee benefit plan." *Id.* at 448 (*citing* C.F.R. Secs. 2510.3-3(b) & 2510.3-3(c)). This ruling is entirely consistent with the Ninth Circuit's holding in *Lowenschuss*. The *Madonia*

Court viewed the determination as a two-step process. First, the Fourth Circuit held that the sole owner must establish that the employee benefit plan benefited other employees. To determine this threshold issue, the Fourth Circuit applied the definition of "employee" as set forth in 29 C.F.R. § 2510.3-3. *Id.* Second, and only after the sole owner established the existence of the an ERISA-qualified plan, did the Fourth Circuit apply the "common law employee" definition to determine if the sole owner was a "participant." *Id.* at 449-450. Unlike Debtor, the sole owner in *Madonia* established *via* credible evidence that the employee benefit plan benefited employees other than himself. *Id.* At that point, the *Madonia* Court determined whether that sole owner was eligible as a "participant" using the definition of a "common law employee". *Id.*

The Ninth Circuit held that contrary to the express terms of ERISA, Debtor was the sole beneficiary of the Pension Plan, that is, no "employee" as defined in 29 C.F.R. § 2510.3-3 benefited from the Pension Plan. Pet.App. 11a (*citing* 29 U.S.C. § 1003(a)). Thus, Debtor never established the threshold existence of ERISA qualification. Moreover, the Ninth Circuit's determination regarding the status of any other alleged employee is a factual determination. Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10.1. With all respect, the Court should not grant certiorari to review evidence in this case and discuss specific factual findings. *Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318 (1984) (Memorandum Decision).

In sum, Petitioner's effort to convince the Court that the Petition presents an important question of "critical national importance" requiring resolution should be rejected because the eighteen-year history of this case makes any such resolution important to two people only – Debtor and Selnick. The Ninth Circuit made specific factual findings which are not appropriate for, nor worthy of, review by this Court.

II. THE PENSION PLAN SHOULD NOT BE EXCLUDED FROM DEBTOR'S ESTATE UNDER PENNSYLVANIA STATE LAW.

A. Resolution of the Alleged Split is Not Outcome Determinative.

The Ninth Circuit held that, pursuant to 11 U.S.C. § 541(c)(2), "[o]nly if the transfer restriction contained in the trust instrument is enforceable under applicable non-bankruptcy law can the debtor's beneficial interest in that trust be excluded from the bankruptcy estate." Pet.App. 19a. The Ninth Circuit found that "although the Pension Plan contains a transfer restriction, that transfer restriction is not enforceable under" Section 8124(b) of Pennsylvania Consolidated Statutes. Pet.App. 16a. Section 8124(b) of the Pennsylvania Consolidated Statutes is Pennsylvania's exemption statute which only restricts judgment creditors from attaching or executing on property of a judgment debtor and "operates without regard to a transfer restriction that may be contained in the trust instrument." Pet.App. 17a; *see also* 42 Pa. Cons. Law Ann. § 8124(b). The Ninth Circuit found its holding in conflict with the Third and Eleventh Circuits, which do not

require the restriction to be contained in the trust instrument. *See In re Yuhas*, 104 F.3d 612 (3d Cir. 1997); *In re Meehan*, 102 F.2d 1209 (11th Cir. 1997).

Resolution of the split in circuits regarding this issue will not impact the outcome of this case, as regardless of any determination negative to Selnick, she remains entitled to distribution of her ownership interest in the Pension Plan assets and to enforce her March 1992 Judgment directly against the Pension Plan.

First, 42 Pa. Cons. Law Ann. § 8124(b) is only applicable to "money or other property of a judgment debtor." The Pension Plan Trustee ignores the fact that Selnick is not merely a "judgment creditor" of Debtor. The Divorce Decree is not a judgment, but rather is an order which "equitably distributed" the marital assets of Debtor and Selnick. This "equitable distribution" granted Selnick an ownership interest in the Pension Plan assets. *In re Lowenschuss*, 170 F.3d at 930. Pennsylvania's exemption statute does not apply to Selnick's ownership interest in the Pension Plan awarded in the Divorce Decree.

Additionally, Section 541(c)(2) only applies to the *debtor's beneficial interest* in the Pension Plan. Debtor's beneficial interest in the Pension Plan is subject to Selnick's ownership interest; i.e.; Debtor's beneficial interest in the Pension Plan does not include Selnick's ownership interest. Thus, neither 11 U.S.C. § 541(c)(2) nor 42 Pa. Cons. Law Ann. § 8124, impedes Selnick's ownership interest in the Pension Plan; the provisions are simply inapplicable. A resolution of the alleged split between the circuits contrary to the Ninth Circuit on this issue will

not impact Selnick's ownership interest in the Pension Plan assets.

Moreover, the Pension Plan Trustee incorrectly asserts that the entire Pension Plan is subject to the exemption statute, 42 Pa. Cons. Law Ann. § 8124(b). However, according to Section 8124(b)(1)(ix)(B) of the Pennsylvania Consolidated Statutes, the exemption does not apply to amounts contributed by the debtor to the retirement or annuity fund in excess of $15,000 within a one (1) year period. According to the Pension Plan Trustee, Debtor established the Pension Plan in 1976. Petition 2. Debtor is attempting to exclude the entire value of the Pension Plan (which as of the Divorce Decree in July 1991 was valued at approximately $8 million). Pet.App. 3a; 42a-43a. Even assuming *arguendo* Debtor contributed the maximum $15,000 exemption for the sixteen (16) years prior to the Petition Date, Debtor would only be entitled to a $240,000 exemption under Section 8124(b) of the Pennsylvania Consolidated Statutes, and not the entire exemption the Pension Plan Trustee seeks. As noted by the Ninth Circuit, Debtor has admitted to receiving more than four times that amount – over $1,000,000 from the Pension Plan post-petition. Pet.App. 4a, n.2. To the extent that Petitioner argues that the contributions were made by Fred Lowenschuss Associates (the employer), rather than Debtor (the employee), the Ninth Circuit has noted that during all relevant time periods Debtor has been, among other designations, the sponsor of the Pension Plan. *In re Lowenschuss*, 170 F.3d at 931, n.8; *see also In re Lowenschuss*, 67 F.3d 1394, 1396 (9th Cir. 1995).

Finally, the Pension Plan Trustee ignores the fact that the March 1992 Judgment was not only entered against Debtor, it was also entered directly against the Pension Plan, a non-debtor entity. Regardless of the resolution of the split among the circuits of this issue, the March 1992 Judgment against the Pension Plan may be enforced directly against the Pension Plan and Selnick is entitled to her unsatisfied judgment amount.

B. The Ninth Circuit Was Correct In Holding That The Pension Plan Was Not Excluded From Debtor's Bankruptcy Estate Pursuant To Pennsylvania State Law.

In *Patterson v. Shumate*, the Court stated, "The natural reading of the provision [11 U.S.C. § 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *Patterson v. Shumate*, 504 U.S. at 758. Pursuant to the directive of *Patterson*, the Ninth Circuit correctly held that "in order for Debtor's beneficial interest in the Pension Plan to be excluded under Pennsylvania law, two conditions must be satisfied: (1) the Pension Plan must contain a transfer restriction, and (2) that transfer restriction must be enforceable under Pennsylvania law." Pet.App. 16a. The Ninth Circuit found that while the Pension Plan contained a transfer restriction, that restriction was not enforceable under Pennsylvania law, specifically 42 Pa. Cons. Law Ann. § 8124(b). Pet.App. 16a.[12]

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[12] The Ninth Circuit noted that its decision would "not impose on bankruptcy debtors an unnecessary hardship

The Ninth Circuit reasoned that in *Patterson*, the Court held that:

> the transfer restriction required in every ERISA plan was enforceable because ERISA-plan participants or beneficiaries could enforce the transfer restriction through ERISA's civil remedies . . . In contrast, section 8124(b) does not provide a mechanism by which Debtor can enforce the transfer restriction contained in the Pension Plan. In fact, the section 8124(b) exemption operates without regard to a transfer restriction that may be contained in the trust instrument. Therefore, Debtor's interest in the Pension Plan cannot be excluded from the bankruptcy estate under section 8124(b).

Pet.App. 17a.

The Ninth Circuit's holding is correct.

In sum, Petitioner's effort to convince the Court that the Petition is necessary to resolve a split between the Fourth and Eleventh Circuits on the one hand and Ninth Circuit on the other hand should be rejected. In reality, resolution of the split among these circuits will have no meaningful impact on the dispute in this case; that is, the dispute between Selnick, Debtor and the Petitioner. For the myriad of reasons set forth in this Opposition, regardless of the resolution of the split in circuits, Selnick is entitled to both her ownership interest in the Pension

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because the state exemption laws such as section 8124(b) . . . can be invoked pursuant to 11 U.S.C. § 522(b)(2) to exempt from bankruptcy estate debtor's interest in trusts that otherwise satisfy those state laws." Pet.App. 20a, n.13.

Plan assets by virtue of the Divorce Decree and satisfaction of her March 1992 Judgment. Moreover, the Ninth Circuit, in keeping with *Patterson*, correctly determined that the Pension Plan assets are not excluded from Debtor's bankruptcy estate pursuant to Pennsylvania law.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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